

I. Fish and Game Code Section 5650

Fish and Game Code section 5650 makes it unlawful to deposit into, permit to pass into, or place where it can pass into the waters of the state certain specified pollutants (*e.g.*, petroleum products, factory wastes, sawdust, lime, and cocculus indicus - a natural plant toxin that stuns fish), as well as a broad proscription against the deposit of any “material deleterious to fish, plant life, or bird life.” (*See* Fish & Game Code sect. 5650, subd. (a)(6).) One of California’s oldest water pollution laws, section 5650 has remained fundamentally unchanged since 1870. This law was championed at its inception by the agricultural industry to protect streams and rivers from the destructive effects of the gold miners.

Section 5650 is a strict liability offense, obviating the need to prove any willful or negligent conduct in order to sustain a violation or a conviction. As the California Court of Appeal explained by upholding the application of a strict liability standard in a criminal offense:

This Court cannot agree with Chevron’s insistence that section 5650 be construed to require proof of scienter or criminal negligence. Section 5650 on its face does not require such proof. What is more important, however, is that the subject matter of this statute – the prevention of adverse impacts upon California’s fish, plant life or bird life through water pollution – is clearly within the regulatory *public welfare* exception to the criminal prosecution mens rea requirement. (*People v. Chevron Chemical Co.* (1983) 143 Cal.App.3d 50, 54 (emphasis in original).)

Section 5650(a)(6) covers an extremely wide range of materials, many of which may not ordinarily be thought of as pollutants, such as milk, whey, sand, silt, and sediments. Certain organic materials when introduced into state waters can result in a chemical reaction which draws oxygen out of the water, leading to harm or death to fish life. Even an increase in water temperature can have a deleterious effect on aquatic life, which is proscribed under section 5650(a)(6). As stated in *People v. Guntert* (1981) 126 Cal.App.3d Supp. 1, 7-8, a material does not have to cause permanent annihilation or dislodgement of fish, bird, or plant life for it to be deemed deleterious. *Guntert* also addressed the term “deleterious” and joined its wide definition with the broad protection created by the underlying purpose of the statute itself. (*Id.* at p. 7.) Moreover, Fish and Game Code section 45 codifies a very expansive definition of “fish.” “Fish” is defined to include “wild fish, mollusks, crustaceans, invertebrates, or amphibians, including any part, spawn, or ova thereof.”

Defenses to section 5650 are quite limited, due to the strict liability standard, and typically involve challenges to the sampling, methodology, and quality assurance/quality control aspects of the testing of the deleterious material. In 1997, section 5650 was amended to exempt from prosecution certain discharges that have been otherwise authorized or allowed by state or federal water pollution agencies. (Fish & Game Code sect. 5650, subd. (b).) The Legislature also created an affirmative defense limited to criminal prosecutions where the defendant has no prior violations or no willful conduct. (Fish & Game Code sect. 5650, subd. (c)-(f).) Ultimately, defendants have a difficult burden to overcome to in strict liability cases, and must show affirmative actions taken to “discover, prevent and remedy” any and all violations. (*See People v. Matthews* (1992) 7 Cal.App.4th 1052, 1062.)

Punishment for violation of section 5650, a misdemeanor, can include up to six months in jail and a \$1,000.00 fine. Violations of section 5650 subdivisions (a)(1) and (a)(2) are punishable by up to one year in jail and a \$2,000.00 fine. There are additional enhancements for violations of these subdivisions, including up to ten dollars (\$10.00) for each gallon or pound of material discharged, reasonable costs incurred for abatement and mitigation of the damages, and any reasonable costs for cleanup of the material itself. (Fish and Game Code sect. 12011.)

Pursuant to Fish and Game Code 5650.1, violations of section 5650 may be prosecuted civilly. Section 5650.1 is very detailed and addresses factors that a court must assess when determining the civil penalty to be imposed, which may be up to \$25,000.00 per violation. These factors include the extent and gravity of the violation, the degree of toxicity and volume of the discharge, harm caused by the violation, and the defendant’s ability to pay and continue in business. (Fish & Game Code sect. 5650.1, subd. (c).)

II. Natural Resources Damages Recovery Under Fish and Game Code Section 12015

In addition to any other penalties, fines, or enhancements imposed pursuant to a finding of a violation or a conviction under the Fish and Game Code, anyone responsible for polluting, contaminating, or obstructing the

waters of the state shall be required to remove any substance placed in the waters, or to remove any material threatening to pollute, contaminate, or obstruct the waters of the state. (Fish and Game Code sect. 12015.) If a responsible party fails to provide adequate and timely cleanup, the Department of Fish and Game will remove or cleanup the material and the responsible party must pay the costs of removal incurred by the Department. (*Id.*) As a separate tool, Fish and Game Code section 12016 provides for civil liability “to the Department for all actual damages to fish, plant, bird, or animal life or their habitat.”

In all cases where a defendant is convicted of a crime, the court is required to impose a restitution fine. (Penal Code sect. 1202.4, subd. (b).) Penal Code section 1202.4, subdivision (f), also requires the court to make a restitution order when a victim has suffered an economic loss as a result of a defendant’s conduct. Restitution is not limited to traditional losses or victims. Penal Code section 1202.4, subdivision (k)(2), defines victim to include any government, governmental subdivision, agency, or instrumentality when that entity is a direct victim of a crime. To the extent that the Department of Fish and Game, as trustee for wildlife resources, suffers a loss to the trust resources that it holds, the defendant should be ordered to pay for any provable economic loss to that resource. This can be proven, through the use of natural resource economists, by measuring the reduction in land value, measuring the resource value as compensation to the public for lost habitat services up until the damage resource has fully recovered, replacement costs alone, or any other method of showing economic loss.

III. Water Code section 13376

Water Code section 13376 prohibits any discharge of pollutants or dredged or fill material to the navigable waters of the United States except as authorized by the Federal Water Pollution Control Act. Water Code section 13387, subdivision (a)(2), prohibits the negligent or intentional violations of “any waste discharge requirements or dredged or fill material permit,” which constitutes a crime. Subdivision 13387(b) provides that if any of these acts are done negligently, they are misdemeanors punishable by a minimum fine of \$5,000.00 and a maximum fine of \$25,000.00 for each day of violation or by a jail sentence of up to one year. Subdivision 13387(c) provides that if any of these acts are done “knowingly,” they are felonies punishable with a prison sentence of up to three years and fines ranging from a minimum of \$5,000.00 up to a maximum \$50,000.00 for a first offense. Because section 13387 does not expressly indicate that knowledge that a material is a pollutant is an element of the offense, a mistake of law claim by a defendant in a prosecution pursuant to subdivisions 13387(a)(1) and (c), premised on a violation of section 13376, that the defendant did not know the material was legally defined as a pollutant is not a defense.

IV. Health and Safety Code section 42400.2(a)

Under Health and Safety Code section 42400.2, subdivision (a), a knowing emission of air contaminants in violation of any order, rule, or regulation, and a failure to take corrective action constitutes a misdemeanor. This violation is punishable by a fine of up to \$40,000.00 or up to one year in jail.